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OFFICE OF
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REPLY TO:
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INSURANCE BUILDING
OLYMPIA, WASHINGTON 98504
753-7300, AREA CODE 206

BULLETIN

No. 90-2

January 26, 1990

Subject: SALE OF UNAUTHORIZED HEALTH INSURANCE—AGENTS BEWARE

Health insurance plans are being marketed in our state in disregard of the requirements of the insurance code or under claims they are exempt from our jurisdiction. Agents and brokers who are marketing these plans should be warned again, as they have been at the various commissioner-sponsored continuing education seminars and by bulletin, that they may be placing their insurance licenses and their personal assets in jeopardy.

In some cases these plans are claimed to be employee welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). However, they appear to be offered to anyone regardless of trade or profession, without regard to commonality among the employer members. Further, they are not established or maintained by an employer or an employee organization as required for ERISA jurisdiction.

We are greatly concerned about some of these plans. They are appealing to consumers because they promise low premium rates, but they promise more than they can fulfill. Ultimately they fail, leaving claims unpaid and people uninsured, including some who have become uninsurable.

In accord with action being taken in other states, we are going to treat these enterprises as the insurers they are. They are subject to state regulation. Basically they are multiple employer trusts—a term not defined in ERISA, but commonly used in the insurance industry. Assuming, however, that such a plan qualifies as an employee welfare benefit plan under ERISA, at best it would be a multiple employer welfare arrangement (MEWA). Even a MEWA that is fully insured (which these are not) would be subject to state standards relative to the maintenance of specified levels of reserves and specified levels of contributions. If they are not fully insured (which is nearly always the case), they are subject to any law of any state which regulates insurance to the extent not inconsistent with ERISA's requirements. The U.S. Department of Labor has the authority to issue regulations exempting MEWAs from the operation of "burdensome" state regulation. It has not done so and has indicated that it will not, even if states require supposed multiple-employer ERISA plans to obtain certificates of authority or registration.

In our attempt to protect the public from sales of health insurance from unqualified entities, we will be applying the following principles:

1. The burden will be on any organization selling health insurance benefits to prove it is legally authorized to do so. Generally, under

Washington state law that will mean it must have a certificate of authority to transact disability insurance in our state as an insurer, or it must be registered as either a health care service contractor or a health maintenance organization.

2. Where an entity is selling coverage indemnifying against contingent losses without authority as an insurer, health care service contractor or health maintenance organization, it could become the subject of a cease and desist order, an order to show cause or other appropriate action. If necessary, the commissioner could prosecute an action in court to enforce his order.

3. If an agent or broker is participating in the sale of such coverage by an unauthorized insurer, that agent's or broker's license is in jeopardy. Licensees must be "competent" and "trustworthy" to receive and maintain their licenses. Those qualities are doubtful when someone proposes these plans to trusting applicants. When a plan fails, it provides nearly conclusive evidence that the licensee has been "a source of injury and loss to the public," another statutory ground for revocation of a license. (In addition, where people are harmed, agents who improperly marketed such plans might find themselves the subjects of lawsuits, perhaps facing claims for actual and punitive damages plus costs and attorney fees as allowed by the Consumer Protection Act.)

4. The insurance code provides an orderly system whereby insurance may be provided to the public with necessary safeguards to assure that insureds will receive the benefits of their bargain. The code works reasonably well and must be observed. Any claimed exception to its standards will be opposed vigorously. In general, we will recognize only such exceptions as are spelled out in the code itself, for example, certain "joint insuring or self-funding" operations as recognized by RCW 48.01.050 and chapter 48.62 RCW; or exceptions clearly resulting from federal law, such as an ERISA plan maintained for employees of a single employer, or a plan maintained pursuant to a collective bargaining agreement or maintained by a tax exempt rural electric cooperative.

In a nutshell, whether in respect to future or existing plans, a cry of "ERISA" or "MEWA" will not prevent this office from carrying out its proper duties under the insurance code when that becomes necessary.

DICK MARQUARDT
Insurance Commissioner